Arab-Malaysian Merchant Bank Bhd & Ors v Court Square Pelita Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22-87 OF 1998-III(I)
IAN CHIN J
25 JANUARY 2000

Contract — *Interest — Calculation of — Dispute as to rate of interest — Affidavit evidence and newspaper cutting tendered; whether raised triable issues — Failure to particularize — Whether interest claimable — Construction of loan agreement*

Contract — *Terms — Implied terms — Term that loan not repayable if project fail through no fault of lender — Business efficacy test — Whether terms is so obvious that it goes without saying — Time of repayment provided in loan agreement; whether exclude possibility of implying term dealing with same subject matter*

The plaintiffs agreed to lend to the first defendant a term loan of RM11.4m and a bridging loan of RM43.6m. The loan was guaranteed proportionately by the second, third, fourth and fifth defendants. The loan, under the agreement dated 13 July 1995, was to assist the first defendant to purchase lands and then to fully develop and construct a two-phase project, consisting of a trade centre and a complex. On 30 April 1997, the trade centre was certified to have been practically completed but the occupation certificate, through no fault of the first defendant, was not issued resulting in a halt in the sale of the office lots in the trade centre. This resulted in the first defendant being unable to repay the loan in accordance with the terms of the loan agreement. Summary judgment was entered for and against the various parties in the various sums in terms of the statement of claim. The defendants appealed, contending that there were triable issues. The first defendant submitted that there was wrongful termination of the loan. It was pleaded that there were implied terms of the agreement, inter alia: (i) that the plaintiffs shall extend the period of completion of the project so that neither party would suffer loss when the project was stalled through no fault of the defendants; and (ii) that the first defendant shall be given reasonable time to repay the loan when the buildings could not be sold through no fault of the defendants. It was also submitted that there was excessive claim for interest. It was pleaded that the plaintiffs had failed to particularize the interest and the principal sum in any of the pleadings or affidavit and that the plaintiffs insisted on charging exorbitant costs of funds and base lending rate as pleaded in the statement of claim despite the sharp drop over the last few months. A newspaper cutting was exhibited evidencing the drop in the interest rate. The base lending rates mentioned in the statement of claim were as at 16 March 1998 whereas the newspaper cutting referred to a period after 16 March 1998. The second and the fifth defendants contended that the plaintiffs as bankers and chargee of properties of the first defendant owed a duty of care — based on the common law and s 7.02 of the loan agreement — to the second and fifth defendants to ensure that their acts or omission would not prejudice the security upon which the second and fifth defendants stand as guarantors. The propositions of duty of care involved the obtaining of relevant permissions for the construction and occupation of the building and the proper supervision of the construction works to ensure that the buildings were not constructed as to encroach on someone else's land. The third defendant contended that there was a collateral understanding based on the factual matrix and the representations of the plaintiffs in connection to the guarantee given by the third defendant. One term of the alleged collateral agreement was that there must be no drawdown of the loan by the first defendant until all necessary permits and licenses were obtained. It was alleged that none of the approvals were obtained and despite that the plaintiffs had allowed the first defendant to draw on the loan. The fourth defendant contended that there were triable issues, namely that the guarantee had been procured on behalf of the plaintiffs from the fourth defendant by unlawful alteration of the consent of the Minister for Resource Planning and that there was misrepresentation by the plaintiffs.

Held, allowing the appeal in part:

(1) It was clear from the words of the loan agreement that the plaintiffs were not to be tied down to demand for repayment only if there were proceeds of sale of the buildings of the project. The argument of the defendants had the result that should the project fail through no fault of the defendants, the plaintiffs could not demand for repayment. That in the face of the terms of the loan agreement was plainly unarguable (see p 285E–F).

(2) The court may infer from the evidence that the parties to a contract must have intended to include the terms in the contract. To successfully invoke the implied terms, two tests must be satisfied, namely: (i) the term is something so obvious that it goes without saying; and (ii) the term should be of a kind as to give business efficacy to the transaction of the contract. In the instant case, the court could not foresee the plaintiffs or any financial institutions agreeing to the terms as submitted by the first defendant. They would obviously be rejected rather than agreed to outright. Those terms also could hardly be efficacious for the parties to be left in such a limbo as to suspend the obligations until the first defendants could sell the buildings which would result in loss to both the plaintiffs and the first defendants (see pp 288E–G, 289B–D); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 followed.

(3) Time for repayment was a matter already covered by the loan agreement. It is a canon of construction that an express term in a contract excludes the possibility of implying any term dealing with the same subject matter as the express term (see pp 289E).

A (4) The first defendant did not point to any provision in the loan agreement or of the law which rendered the interest unclaimable upon the failure to particularize or which rendered the sum claimed a triable issue. The rate of interest payable was all provided in the loan agreement. Further, the officers of the B plaintiffs had all certified the amount of indebtedness. In the circumstances, the plaintiffs would have prima facie established its case for judgment for that sum. Whether it was prima facie or conclusive proof of the debt, it shifted the burden on the first defendant to show how the sum claimed was incorrect. The first defendant had failed to discharge that burden and had therefore C failed to raise any issue for trial regarding the amount due (see pp 290C–F,291G); *Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377 not followed.

(5) Unless there was a provision in the loan agreement to say that the rates shall apply irrespective of what the actual rates were from time to time, it was arguable whether the plaintiffs were entitled D to that interest after 16 March 1998. In this regard, the first defendant in introducing the affidavit evidence and the newspaper cutting had established sufficient facts to raise a triable issue regarding those interest (see p 292G–H).

(6) There was nothing in the loan agreement which lay down a duty E on the party of the plaintiffs to ensure that the trade centre was built in conformity with the relevant laws and by-laws. In any event, the loan agreement was not a contract between the plaintiffs and the second defendant or the fifth defendant and it could not be comprehended how such a contract could give rise to contractual obligations on the part of the plaintiffs to the F second defendant or the fifth defendant (see p 296D–E).

(7) Order 14 r 4(1) of the Rules of the High Court 1980 provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise and that a defendant is entitled to show over and above what has been pleaded in the defence (see G p 297D); *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 followed.

(8) It was the duty of the first defendant under the laws concerned to obtain whatever permission that was required for the construction and occupation of the building and to allow their failure to do so H to ground an action against the plaintiffs would be against accepted social norm (see p 299D–E).

(9) There was no waiver in the loan agreement in respect of the requirements of approval to be obtained by the plaintiffs relating to draft plans, survey plan and building plan. Therefore, the court I could not say that there was no arguable issue concerning the alleged collateral agreement urged by the third defendant which had been set up as relieving the third defendant from liability (see p 301G–H).

(10) For the fourth defendant to succeed, it has to be shown that it was illegal for the fourth defendant to give a guarantee without the consent of the chief minister. The fourth defendant could not point to any such provision in the law. In fact, no consent is required where the guarantee is within such limits as the chief minister has fixed. It was not the case for the fourth defendant that the guarantee given was in excess of the amount fixed. In fact, that it was a proportionate guarantee showed that it was within the approved limit. Therefore, it was not arguable that the guarantee was illegal and unenforceable because of lack of consent (see p 306B–D).

[**Bahasa Malaysia summary**

Plaintif-plaintif telah bersetuju untuk meminjamkan defendan pertama suatu pinjaman berjangka masa sebanyak RM11.4j dan suatu pinjaman perangkai (bridging loan) sebanyak RM43.6j. Pinjaman tersebut telah dijaminkan bersekadar oleh defendan-defendan kedua, ketiga, keempat dan kelima. Pinjaman tersebut, di bawah perjanjian bertarikh 13 Julai 1995, adalah untuk membantu defendan pertama untuk membeli tanah dan kemudiannya untuk dibangunkan dan dibinakan sepenuhnya satu projek fasa dua, yang melibatkan sebuah pusat dagangan dan sebuah kompleks. Pada 30 April 1997, pusat dagangan tersebut telah disahkan sebagai telah siap tetapi sijil penempatan, yang bukan disebabkan oleh kesilapan defendan pertama, tidak dikeluarkan mengakibatkan tangguhan penjualan lot-lot pejabat di pusat dagangan tersebut. Ini telah mengakibatkan defendan pertama tidak mampu membayar balik pinjaman menurut terma-terma perjanjian pinjaman tersebut. Penghakiman terus telah dimasuki untuk dan terhadap pelbagai pihak di dalam pelbagai jumlah mengikut terma di dalam pernyataan tuntutan tersebut. Defendan-defendan telah merayu, menegaskan bahawa wujud isu-isu yang perlu didengari. Defendan pertama telah mengemukakan bahawa wujud penamatan yang tidak sah berhubung pinjaman tersebut. Adalah dirayukan bahawa wujud terma-terma yang tersirat di dalam perjanjian tersebut, antara lain: (i) bahawa plaintif-plaintif hendaklah melanjutkan tempoh penyiapan projek tersebut supaya mana-mana pihak tidak akan menanggung kerugian apabila projek tersebut tertangguh yang bukan daripada kesilapan defendan-defendan tersebut; dan (ii) bahawa defendan pertama hendaklah diberi tempoh yang munasabah untuk membayar balik pinjaman apabila bangunan-bangunan tersebut tidak boleh dijual yang bukan daripada kesilapan defendan-defendan tersebut. Adalah dihujahkan juga bahawa terdapat tuntutan faedah yang berlebih-lebihan. Adalah dirayukan bahawa plaintif-plaintif telah gagal untuk memperincikan faedah tersebut dan jumlah utama di dalam mana-mana pliding atau afidavit dan bahawa plaintif-plaintif telah berkeras mendesak untuk mengenakan kos-kos pembiayaan dan kadar pinjaman datar yang

A tinggi sebagaimana yang telah dirayukan di dalam pernyataan tuntutan meskipun terdapat kejatuhan yang meruntun sejak beberapa bulan lalu. Satu keratan akhbar telah diekshibitkan untuk menerangkan kejatuhan kadar feadah tersebut. Kadar pinjaman datar yang dinyatakan di dalam pernyataan tuntutan adalah setakat 16 Mac 1998 manakala keratan akhbar merujuk kepada satu tempoh selepas B 16 Mac 1998. Defendan-defendan kedua dan kelima menegaskan bahawa plaintif-plaintif sebagai pengurus bank dan yang mengenakan bayaran ke atas harta-harta defendan pertama mempunyai satu kewajipan berjaga-jaga — berdasarkan common law dan s 7.02 kepada perjanjian pinjaman — kepada defendan-defendan kedua dan C kelima bagi memastikan bahawa tindakan dan peninggalan mereka tidak akan memprejudiskan sekuriti tersebut yang mana defendan-defendan kedua dan kelima adalah penjamin-penjaminnya. Kenyataan tentang kewajipan berjaga-jaga ini melibatkan pemerolehan kebenaran yang relevan untuk pembinaan dan penghunian bangunan tersebut dan pengawasan kerja-kerja pembinaan tersebut D bagi memastikan bahawa bangunan tersebut tidak dibina sehingga masuk ke tanah orang lain. Defendan ketiga menghujahkan bahawa terdapat persefahaman kolateral berdasarkan fakta matriks dan wakil-wakil plaintif yang berkaitan dengan jaminan yang diberikan oleh defendan ketiga. Salah satu daripada terma di dalam perjanjian kolateral yang didakwa tersebut adalah bahawa pinjaman oleh E defendan pertama mestilah tidak dibuat sehingga segala permit-permit dan lesen-lesen yang perlu telah diperolehi. Adalah didakwa bahawa tiada satupun daripada kelulusan tersebut diperolehi dan walaupun setelah plaintif-plaintif membenarkan defendan pertama membuat pinjaman tersebut. Defendan keempat menegaskan bahawa F wujud isu-isu yang perlu didengari, terutamanya, bahawa jaminan tersebut telah didapati bagi pihak plaintif-plaintif daripada defendan keempat secara pengubahan yang tidak sah tentang kebenaran Menteri Perancangan Sumber dan bahawa terdapat salah nyata oleh plaintif-plaintif.

G **Diputuskan**, membenarkan sebahagian daripada rayuan tersebut:

(1) Adalah jelas daripada perkataan-perkataan di dalam perjanjian pinjaman tersebut bahawa plaintif-plaintif tidak terikat untuk meminta pembayaran semula hanya jika terdapat hasil kutipan jualan bangunan-bangunan projek tersebut. Hujah defendan-H defendan membawa akibat di mana sekiranya projek tersebut gagal bukan disebabkan oleh kesilapan defendan-defendan, plaintif-plaintif tidak boleh menuntut bayaran balik. Nyata terma-terma di dalam perjanjian pinjaman tersebut tidak boleh dipertikaikan lagi (lihat ms 285E–F).

I (2) Mahkamah boleh membuat inferens daripada keterangan bahawa pihak-pihak kepada kontrak mestilah berhasrat untuk memasukkan sekali terma-terma di dalam kontrak tersebut.

Untuk meng-gunakan terma-terma yang tersirat, dua ujian mestilah dipenuhi, terutamanya: (i) terma tersebut adalah suatu yang amat nyata sehingga tidak perlu dinyatakan; dan (ii) terma tersebut hendaklah merupakan suatu jenis yang memberikan keberkesan-an perniagaan kepada transaksi kontrak tersebut. Di dalam kes ini, mahkamah tidak dapt menjangka plaintif-plaintif atau mana-mana institusi kewangan bersetuju kepada terma-terma seperti mana yang dikemukakan oleh defendan pertama. Mereka dengan jelas akan menolak daripada bersetuju dengan nyata. Terma-terma tersebut juga tidak mungkin berkesan kepada pihak-pihak sehingga berada dalam keadaan terawang-awang sebagai menangguhkan tanggungjawab-tanggungjawab sehingga defendan per-tama boleh menjual bangunan-bangunan tersebut yang akan mengakibatkan kerugian kepada kedua-dua pihak plaintif dan defendan pertama (lihat ms 288E–G, 289B–D); *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 diikut.

(3) Tempoh bayaran semula merupakan satu perkara yang telah pun dipenuhi oleh perjanjian pinjaman tersebut. Adalah peraturan interpretasi bahawa suatu terma nyata di dalam kontrak mengecualikan kemungkinan membayangkan apa-apa terma lain yang membicarakan perkara pokok yang sama sebagai terma yang nyata (lihat ms 289E).

(4) Defendan pertama tidak menunjukkan kepada mana-mana peruntukan di dalam perjanjian pinjaman atau undang-undang yang menjadikan faedah tersebut tidak boleh dituntut apabila berlakunya kegagalan untuk memperincikan atau yang menjadikan jumlah yang dituntut satu isu yang perlu didengari. Kadar faedah yang perlu dibayar semuanya telah diperuntukkan di dalam perjanjian pinjaman. Tambahan pula, pegawai-pegawai plaintif telahpun semuanya mengesahkan jumlah yang terhutang. Di dalam keadaan ini, plaintif-plaintif dapat mewujudkan prima facie di dalam kesnya untuk penghakiman bagi jumlah tersebut. Sama ada adalah bukti prima facie atau konklusif hutang tersebut, ia telah memindahkan beban kepada defendan pertama untuk menunjukkan bagaimana jumlah tuntutan tersebut adalah salah. Defendan pertama gagal untuk melepaskan beban tersebut dan oleh demikian gagal untuk menimbulkan apa-apa isu yang perlu didengari berhubung dengan jumlah yang perlu dibayar (lihat ms 290C–F, 291G); *Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377 tidak diikut.

(5) Kecuali jika terdapat peruntukan di dalam perjanjian pinjaman tersebut yang menyatakan bahawa kadar-kadar tersebut hendaklah terpakai tidak kira apa kadar-kadar sebenarnya dari masa ke semasa, adalah boleh dipertikaikan sama ada plaintif-plaintif berhak terhadap faedah tersebut selepas 16 Mac 1998. Berhubung dengan perkara ini, defendan pertama di dalam

memperkenalkan keterangan afidavit dan keratan akhbar tersebut telah menunjukkan fakta-fakta yang mencukupi untuk menimbulkan satu isu yang perlu didengari berhubung faedah tersebut (lihat ms 292G–H).

(6) Tiada apa di dalam perjanjian pinjaman yang menyatakan tentang kewajipan satu pihak plaintif untuk memastikan bahawa pusat dagangan tersebut telah dibina bersesuaian dengan undang-undang dan undang-undang kecil yang relevan. Di dalam apa keadaan pun, perjanjian pinjaman tersebut bukanlah kontrak antara plaintif-plaintif dan defendan kedua atau defendan kelima dan ia tidak boleh difahami bagaimana suatu kontrak boleh menimbulkan tanggungjawab kontraktual di pihak plaintif-plaintif terhadap defendan kedua atau defendan kelima (lihat ms 296D–E).

(7) Arahan 14 k 4(1) Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa defendan boleh menunjukkan sebab terhadap permohonan untuk penghakiman terus melalui afidavit atau sebaliknya dan defendan tersebut berhak untuk menunjukkan lebih daripada apa yang telah dirayukan di dalam pembelaan (lihat ms 297D); *Lin Securities (Pte) v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 diikut.

(8) Adalah kewajipan defendan pertama di bawah undang-undang yang berkaitan untuk mendapatkan apa-apa kebenaran yang perlu untuk pembinaan dan penghunian di bangunan tersebut dan untuk membenarkan kegagalan mereka berbuat demikian hampir menyamai suatu tindakan terhadap plaintif-plaintif adalah bertentangan dengan norma sosial yang boleh diterima (lihat ms 299D–E).

(9) Tidak ada penepian di dalam perjanjian pinjaman tersebut mengenai keperluan tentang kebenaran yang perlu diperolehi oleh plaintif-plaintif berhubung dengan draf pelan-pelan, pelan kajian dan pelan pembinaan. Oleh demikian, mahkamah tidak boleh mengatakan bahawa tiada isu yang perlu didengari berhubung dengan perjanjian kolateral yang didakwa tersebut yang telah didorong oleh defendan ketiga di mana telah diadakan untuk melepaskan defendan ketiga daripada liabiliti (lihat ms 301G–H).

(10) Untuk defendan keempat berjaya, perlu ditunjukkan bahawa adalah tidak sah begi defendan keempat memberikan jaminan tanpa kebenaran ketua menteri. Defendan keempat tidak dapat menunjuk kepada mana-mana peruntukan undang-undang. Pada hakikatnya, tiada kebenaran diperlukan di mana jaminan tersebut adalah di dalam lingkungan had sebagaimana ditetapkan oleh ketua menteri. Bukanlah kes bagi defendan keempat bahawa jaminan yang diberikan adalah melebihi jumlah yang ditetapkan. Pada hakikatnya, jaminan bersekadar menunjukkan bahawa ia adalah di dalam lingkingan had yang dibenarkan. Oleh demikian, adalah tidak dipertikaikan lagi bahawa jaminan tersebut adalah

tidak sah dan tidak boleh dikuatkuasakan oleh sebab tidak mendapat kebenaran (lihat ms 306B–D).] A

Notes

For a case on calculation of interest, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2509. B

For a case on implied terms, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3037–3063.

Cases referred to

C

Alliance (M) Engineering Co v San Development Sdn Bhd [1974] 2 MLJ 94 (refd)

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413 (refd)

Aspdin v Austin [1844] QB 671 (refd)

Bank of Commerce (M) Bhd v Tan Boon Soon [1995] 1 AMR 156 (refd) D

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Co-operative Central Bank Ltd v Meng Kuang Properties Bhd [1991] 2 MLJ 283 (refd) E

Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 (refd)

Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd [1992] 2 MLJ 137 (refd)

Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd [1999] 1 MLJ 193 (refd) F

Lin Secuirites (Pte) v Noone & Co Sdn Bhd [1989] 1 MLJ 321 (folld)

Malayan Banking Bhd v Yeo Sun Tong [1999] 6 MLJ 377 (not folld)

Mathew v Blackmore (1857) 1 H & N 762 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

OCBC Bank (Malaysia) Bhd v Livision Sdn Bhd (Suit No 24–87–98–III(I) Kuching High Court I, 22 August 1998) (refd) G

Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors [1990] 2 CLJ 72 (refd)

Pembinaan Jaya Sdn Bhd v Binawisma Development Sdn Bhd [1987] 2 CLJ 446 (refd)

Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran [1986] 1 MLJ 418 (refd) H

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461 (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151 (folld)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd) I

Titford Property Co Ltd v Cannon Street Acceptance Ltd (unreported) (refd)

Tuan Hj Ahmed Abdul Rahman v Arab Malaysian Finance Bhd [1996] 1 MLJ 30 (refd)
United Malayan Banking Corp Bhd v Lim Meng Hua & Ors [1990] 1 MLJ 54 (refd)
United Malayan Banking Corp Bhd v Palm & Vegetable Oil (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)
United Malayan Banking Corp Bhd v Pembinaan KSY Sdn Bhd & Ors [1993] 3 MLJ 45 (refd)
Yap Nyo Nyok v Bath Pharmacy Sdn Bhd [1993] 2 MLJ 250 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Central Bank of Malaysia Act 1958
Contracts Act 1950 s 75
Evidence Act 1950 s 92
Rules of the High Court 1980 O 14 r 4(1)
Sarawak Land Custody and Development Authority Ordinance 1981

Pepertua Phang (Reddi & Co) for the plaintiffs.

Wendy Terang (*Cheng & Associates*) for the first, second and fifth defendants.

Anthony Ting (*Anthony Ting & Co*) for the third defendant.

Wong Siong Tung (*Tan, Yap & Tang*) for the fourth defendant.

Cur Adv Vult

Ian Chin J:

Introduction

Summary judgment was, on 29 April 1999, ordered by the deputy registrar to be entered for and against the various parties in the various sums in terms of the statement of claim as set forth in the following table:

No	Judgment for plaintiff	Judgment against defendant	Amount (Malaysia Ringgit)
1	Arab-Malaysian Merchant Bank Bhd (first plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	4,172,501.15
		Impian Capital Sdn Bhd (second defendant)	2,336,600.64
		Borneo Development Corp (Sarawak) Sdn Bhd (third defendant)	1,001,400.28
		Land Custody & Development Authority (fourth defendant)	834,500.23

2	Eon Bank Bhd (second plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	7,890,242.42
		Impian Capital Sdn Bhd (second defendant)	4,418,535.76
		Borneo Development Corp (Sarawak) Sdn Bhd (third defendant)	1,893,658.18
		Land Custody & Development Authority (fourth defendant)	1,578,048.48
3	Sabah Bank Bhd (third plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	6,016,665.81
		Impian Capital Sdn Bhd (second defendant)	3,369,332.85
		Borneo Development Corp (Sarawak) Sdn Bhd (third defendant)	1,443,999.79
		Land Custody & Development Authority (fourth defendant)	1,203,333.16
4	Interfinance Bhd (fourth plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	4,069,384.31
		Impian Capital Sdn Bhd (second defendant)	2,278,855.21
		Borneo Development Corp (Sarawak) Sdn Bhd (third defendant)	976,652.24
		Land Custody & Development Authority (fourth defendant)	813,876.86
5	The first plaintiff, second plaintiff, third plaintiff and fourth plaintiff	Hanizah Abdul Hamid (fifth defendant)	22,148,793.69

Interest on those sums at above the statutory rate was also awarded to run from 17 March 1998 and costs.

Facts of case

The plaintiffs got together and agreed, after revision, to lend to the first defendant a term loan of RM11.4m and a bridging loan of RM43.6m. This loan was guaranteed proportionately by the second defendant 56%, third defendant 24% and fourth defendant 20%. Hence, the judgment against them in those different sums. The fifth defendant also guaranteed the

A repayment of all moneys owing under the loan by the first defendant to the plaintiffs. For the purpose of the application for summary judgment, an officer of the first plaintiff certified in writing the amount owing by the first defendant.

The loan, under the agreement executed on 13 July 1995 ('loan B agreement'), was to assist the first defendant to purchase the lands and then to fully develop and construct a two-phase project called the Merdeka Square Plaza. The first phase involved the development of a trade centre while the second phase a complex. On 18 January 1996 the first defendant assigned the benefits of the sales of the buildings in the trade centre and of the rentals of the complex to the plaintiff for the purpose of repaying the C loan. For this purpose an account was opened with the third plaintiff and this account was operated jointly by the first plaintiff and the first defendant. The trade centre was, on 30 April 1997, certified to have been practically completed but the occupation certificate, through no fault of the first defendant, was not issued resulting in a halt in the sale of the office lots in the trade centre which had a value of RM10,290,000. This resulted in the D first defendant being unable to repay the loan in accordance with the terms of the loan agreement. The building that was erected had encroached on state land.

Defence of first defendant

E The defence of the first defendant can be summarised as follows:

(1) there was wrongful termination of the loan;
(2) there was excessive claim for interest for the various fees; and
(3) there was no proper demand for payment.

F Those contentions, according to Ms Wendy Terang, learned counsel for the first defendant, second defendant and fifth defendant, raised triable issues. Her contention was adopted by Mr Anthony Ting, learned counsel for the third defendant and Mr Wong Siong Tung, learned counsel for the fourth defendant.

G Contention (1)

In respect of this contention of wrongful termination of the loan, the defence pleaded that:

(1) there is an implied obligation on the part of the plaintiffs to revise the H financial arrangement concerning the said project, and if necessary to extend the period of completion of the said project so that neither party would suffer loss;
(2) the first defendant is 'entitled to a reasonable time to repay the said loan' having regard to the facts set out above;
(3) it is wrongful for the plaintiffs to have recalled the loan without I assigning reason; and
(4) the demand by the plaintiff for full repayment is 'unconscionable harsh oppressive inequitable and is invalid'.

Ms Perpetua Phang, learned counsel for the plaintiffs, contended that those arguments were unsustainable because of the following terms in the loan agreement, viz:

> Section 6.01
>
> *Purpose of the Facilities*
>
> (a) Tranche A
>
> (i) The Term Loan Facility shall be applied by the Borrower for part financing of the acquisition of Lots 1, 2, 4, 6, 7, 8, 9, 13 and 14 all of Section 25 Kuching Town Land District.
>
> (ii) The Bridging Loan shall be applied by the Borrower for financing of up to eighty per centum (80%) of the construction cost of the Trade Centre and part of the preliminaries and earthworks on Lot 21 Section 25 Kuching Town Land District or Ringgit Malaysia Thirteen Million and One Hundred Thousand Only (RM13,100,000.00) whichever is the lower.
>
> (b) Tranche B
>
> Tranche B shall be applied by the Borrower for the financing up to eighty per centum (80%) of the construction cost of the Complex, or Ringgit Malaysia Thirty-Three Million and Five Hundred Thousand only (RM33,500,000) whichever is the lower.
>
> In the event the borrower requires or proposes or intends to use the proceeds of the facilities or of any advance for any other purpose, prior unanimous written consent from the lenders must first be obtained by the borrower, which consent, may be withheld, refused or given unconditionally or subject to terms and conditions as the lenders may in their sole and absolute discretion deem fit without any obligation to give any reasons.
>
> ...
>
> Section 11.01
>
> *Payment of Facilities*
>
> (a) The borrower shall repay the facilities by ninety-seven (97) monthly instalments commencing on the last day of the twenty-four (24) month from the date of the first drawing in the amounts set-out below:

Instalment	Amount of Each Instalment	Total
first to 72nd	RM590,000.00	RM42,480,000
73rd to 96th	RM520,000.0	RM12,480,000
97th	RM 40,000.00	RM40,000
TOTAL		RM55,000,000

> [Etc ...]...
>
> Section 15.05
>
> *Lenders' rights to commence foreclosure and legal proceedings concurrently*
>
> (a) Notwithstanding any provision hereof, it is hereby expressly agreed that upon default or breach by the Borrower of any term covenant stipulation and/or undertaking herein provided and on the part of the Borrower to be

> observed and performed, the Lenders shall thereafter have the right to exercise all or any of the remedies available whether by this Agreement and the Security Documents or by statute or otherwise and shall be entitled to exercise such remedies concurrently or simultaneously or contemporaneously or successively, including pursuing all remedies of sale or possession pursuant to the Land Code (Cap 81) and civil suit or any action to recover all monies due and owing to the Lenders under this Agreement and/or the Security Documents.
>
> Section 20.21
>
> This agreement and the security documents and any other document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein and incidental hereto and supercede all oral negotiations and prior writings in respect of the subject matter hereof.
>
> ...

Section 15.01 was also referred to and it provided that the failure to pay any instalment after a demand was made constituted a breach of the loan agreement and the whole loan then outstanding would become due and payable (see s 15.02).

By the terms of the loan agreement, it is clear that there was no provision as that urged by the first defendant. In fact, the parties notwithstanding that they were aware that the repayment of the loan was to be by way of the proceeds of the sale yet made provision in the terms of s 15.02 to allow the plaintiffs to demand for repayment of the loan in the event of a default in payment of only one instalment. It is clear from the words of the loan agreement that the plaintiffs were not to be tied down to repayment only if there were proceeds of sale of the buildings of the project. The argument of the defendants had the result that should the project fail through no fault of the defendants, say for example, should there be no purchaser or the building could not be sold because the occupation permit could not be obtained, the plaintiffs cannot demand for repayment. That in the face of the terms of the loan agreement is plainly unarguable. That position, which is inconceivable that any financial institutions would ever agree, appears to be relaxed somewhat when it was next contended that the first defendant should be given reasonable time to repay. As was said earlier, the clear and express terms of the loan agreement do not admit of such a construction. In urging such a construction, the defendants submitted that there was an 'understanding between the plaintiffs ... and the first defendant ... that the said loan shall be fully repaid by the collection of rental and sales proceeds upon the completion' of both the trade centre and the complex and that was the reason for the loan agreement to provide for the 'tenure' of the loan to be for ten years from the date of the first drawdown. Given the state of the pleading, I can take it that the defendants are arguing that such a term is to be implied. What, then, are the terms that are sought to be implied? They appear to have been set out in the pleading, and in the arguments which I would summarise this way:

(1) that the plaintiffs shall extend the period of completion of the said project so that neither party would suffer loss when the project is stalled through no fault of the defendants;

(2) that the first defendant shall be given reasonable time to repay the loan when the buildings cannot be sold through no fault of the defendants;

(3) that the plaintiffs cannot recall the loan without assigning reason therefor; and

(4) that the plaintiffs cannot demand full payment unconscionably, harshly, oppressively, inequitably.

For that purpose the defendants referred the court to several authorities. The first of such was *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* [1992] 2 MLJ 137 (SC). In that case, the plaintiff agreed to lend $6m to the first defendant for the purpose of restructuring the borrowers' group borrowings and out of this sum, $1.5m was to be used for the purpose of working capital. It was alleged that the defendants failed to pay the interest due pursuant to cl 7.01 of the agreement upon which the plaintiff demanded repayment of the principal loan and interest thereon. Summary judgment was entered despite the defence that there existed a collateral agreement that the drawdown of $1.5m would be used to service the interest accruing on a quarterly basis. The defendants argued that the loan granted by the plaintiff had a two-fold objective — the initial drawdown of $4.5m for the purpose of restructuring the first defendant's group borrowings whilst the remaining $1.5m was to service the payment of interests when due. They maintained that there existed a collateral agreement between the parties with regard to the drawdown of the $1.5m as represented to them by the general manager of the plaintiff that the sum would be used to service the interest accruing on a quarterly basis. The defendant relied on cl 5.01 of the agreement and two letters for their argument. On the other hand the plaintiff argued that the clause stipulated that the $1.5m loan was to be used for working capital and that prior written consent of the plaintiff was required for any other purpose. In the circumstances, the plaintiff contended, the defendants could not lead evidence to vary or contradict cl 5.01. Clause 5.01(ii) of the loan agreement states that the $1.5m was for the purpose of working capital and that if the money was to be utilized for any other purpose the prior written consent of the lender is required. It was held by the Supreme Court that it should be left to the trial judge to determine whether on the evidence as a whole the contemporaneous letters would amount to prior written consent of the lender within the meaning of cl 5.01(ii) of the agreement. It was also held that there is an issue of law whether the demand for immediate payment was repugnant to the main purpose of the facility of the loan, another contention of the defendants. The Supreme Court, at pp 144–145, said this:

> In an unreported decision of Goff J in *Titford Property Co Ltd v Cannon Street Acceptance Ltd*, on 22 May 1975, the defendant bank had granted term loan facilities to the plaintiffs. The letter granting the facility to the plaintiffs, stated that:
>
> > 'We have pleasure in advising you of the terms and conditions upon which we are prepared to provide an overdraft facility in the maximum sum of Sterling pounds 248,000 for a period of 12 months to assist you in the purchase and development of the undermentioned freehold premises.'

> However, in each facility letter issued by the defendant bank to the plaintiffs, certain specific conditions of the loan were spelt out, amongst which was cl 9, which stipulated that: 'All moneys due by you, whether by way of capital or interest, shall be payable on demand and you shall have the right to repay all moneys due without notice.'
>
> In the face of this apparent contradiction in terms of the loan facility, Goff J said:
>
>> 'It seems to me, where a bank allows an overdraft for a fixed time for a specific purpose — whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure.'
>
> Holding that cl 9 was repugnant to the whole facility granted by the defendant bank, Goff J continued:
>
>> '[The bank] could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify cl 9, by reading it as subject to the provision as to the duration of this facility, or ignore it altogether.'
>
> Goff J's decision in *Titford Property* was considered by Gibson J in *Williams & Glyn's Bank Ltd v Barnes* in the following terms:
>
>> 'It is clear to me that Goff J decided that the true purpose of the agreement contained in the facility letter was to provide money to be laid out in a development project with a view to profit. A provision for repayment on demand was, he concluded, repugnant to that main purpose ...'
>
> Gibson J did not specifically disagree with Goff J's decision in deciding the matter before him on the principle of repugnancy but said that he would prefer to decide the main object and intention of the transaction on point of construction of contract.
>
> In view of the fact that the facility granted by the respondent to the first appellant in this present appeal is a term loan for three years, we are of the opinion that an issue of law has also been raised for determination of the court as to whether the demand for immediate repayment made by the respondent on 22 May 1986 was repugnant to the main purpose of the facility of the loan.

In *Titford Property Co Ltd v Cannon Street Acceptance Ltd*, the unreported case cited there, a loan of £248,000 for a period of 12 months was granted to help purchase and develop certain property but there was also a condition: 'All moneys due by you, whether by way of capital or interest, shall be payable on demand and you shall have the right to repay all moneys due without notice.' It dealt with contradictory and repugnant terms. This is different from the present case where s 15.05 of the loan agreement only permits recall of the loan if the first defendant is in default or in breach of

specified conditions. Thus, there is no contradictory or repugnant terms in A
this case. Therefore, no assistance can be drawn from that case.

As for *Eushun Properties Sdn Bhd & Ors v MBf Finance Bhd* in so far as it dealt with the question of whether certain facts can constitute consent for utilisation of part of the loan towards payment of interest, it is of no relevance. In so far as it dealt with the question of whether the demand for B
immediate payment was repugnant to the main purpose of the facility of the loan, it depended on the facts of that case and in the present case, it has not been pointed out as to where the contradiction or repugnancy is. A term, as that in the loan agreement, providing for recall of loan in the event of default of payment of any instalment cannot be repugnant to the term for repayment by instalment. The instalment repayment can be had but it was C
conditional upon the repayment being actually made.

Those alleged terms (1), (2), (3) and (4) were not the subject of prior discussion and therefore could not be terms of a collateral agreement. The whole problem arose after the loan agreement was signed and when the first defendant could not get the occupation permit for the building that was D
completed in April 1997 resulting in their inability to sell and to garner proceeds to repay the loan. At this stage of the proceedings, there is no evidence that it was in the anticipation of the parties at the time the loan agreement was signed that the occupation permit for the building could not be obtained. It is against this background that the court should consider the law regarding whether the terms should be implied. E

Recently the Federal Court in *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 (FC) went through the law on implied terms. The Federal Court held that there are three types of implied terms. One is where the court infers from the evidence that the parties to a contract must have intended to include it in the contract. Another is where it is F
implied by the operation of law. The third is where it is implied by custom or usage of market or trade. Only the first type is relevant to the present case. To successfully invoke the first type of implied terms, two tests must be satisfied. The first test is that the term is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the G
agreement, they would testily suppress him with a common 'Oh, of course!'. The second test is that the term should be of a kind as to give business efficacy to the transaction of the contract, such as the case where an employment of a managing director for ten years should carry an implied term that the company would not alter the articles to create a right to H
remove the managing director before the ten-year period.

The first term sought to be implied is 'the plaintiffs shall extend the period of completion of the said project so that neither party would suffer loss when the project is stalled through no fault of the defendants'. Such a term has many implications. One of which would be that the extension could be of an indefinite period since the project could be stalled I
indefinitely. Another would be that the first defendant's obligation to repay outstanding sum was to be suspended during that time. The third would be

the question of what qualifies as fault or no fault on the part of the first defendant and that would potentially be very contentious and might lead the plaintiffs to litigation. Would the plaintiffs, then, given those implications, have said 'Oh, of course!' if those terms were suggested by the first defendant for inclusion in the loan agreement during the negotiations? In my view, I cannot foresee the plaintiffs or any financial institution agreeing to such terms. They would obviously be rejected rather than agreed to outright. This means, those terms would have failed the first test. Those terms would also fail the second test because it could hardly be efficacious for the parties to be left in such a limbo as to suspend the obligations until the first defendant could sell the buildings. The longer the period the higher the holding costs would be and there would come a time when the whole project would not be economically viable because of these costs resulting in a loss to both the plaintiffs and the first defendant. It could not, therefore, be business efficacy to provide for such a suspension of obligation which would result in loss to both the plaintiffs and the first defendant.

I turn now to the second term that is sought to be implied which is that the first defendant shall be given reasonable time to repay the loan when the buildings cannot be sold through no fault of the defendants. It is to be noticed that s 15.02 allows for a seven days' notice in the event, among others, of a default to pay any instalment, to demand repayment of the loan. What the first defendant wanted was the enlargement of the seven-day period. Therefore, time for repayment is a matter already covered by the loan agreement. It is a canon of construction that an express term in a contract excludes the possibility of implying any term dealing with the same subject-matter as the express term — expressum facit cessare tacitum (*Mathew v Blackmore* (1857) 1 H & N 762; *Aspdin v Austin* [1844] QB 671; *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250). The court is not permitted to imply a term for repayment after a reasonable time as the time for repayment has already been spelt out.

As for the term that the loan cannot be recalled without assigning reason, it is not an issue because the recall of the loan was for failure to repay the loan.

This takes me to the last of the alleged implied term which is that the plaintiffs cannot demand full payment unconscionably, harshly, oppressively or inequitably. Again the answer is in the Latin maxim — *expressum facit cessare tacitum.*

Contention (2)

The allegation of excess claim is with regard to interest and the management/participation/agency fees. As regards the interest the first defendant contended that (1) the plaintiffs 'had failed to particularise the interest and the principle sum' in any of the pleadings or affidavits; (2) the plaintiffs 'insisted on charging exorbitant cost of funds and base lending rate as pleaded in the statement of claim despite the sharp drop in the same...over the last few months shows the plaintiffs'...tendency to charge

A excessive interest'; and (3) that the charge of 1%pa over and above the margin added to the cost of funds or base lending rate on the outstanding unpaid amount is excessive and a penalty which the plaintiffs cannot recover without proving damages.

There was a further allegation of the first defendant made in an affidavit which appears to have been abandoned since this was not mentioned in the B address of learned counsel for the first defendant. This relates to the question of the notice of the variation of interest which the first defendant alleged they were not informed. In any event, the failure to give such notice is not to affect the right of the plaintiffs to the interest and this is expressly provided in s 9.04 of the loan agreement.

C As for the failure to give particulars of the interest, which is also the complaint regarding the management/participation/agency fees, the first defendant did not point to any provision in the loan agreement or of the law which renders the interest unclaimable upon such failure or which renders the sum claimed a triable issue. The rate of the interest payable is all provided in the loan agreement. Not only that, the officers of the plaintiffs D have all certified under s 20.04 of the loan agreement the amount of indebtedness. When you have such a provision and certificates were issued thereunder, the plaintiffs would have prima facie established its case for judgment for that sum even if one does not accept the conclusiveness which such a clause has on the proof of the debt as decided in *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC). Ms Perpetua Phang had E conceded that such a certificate is still open to challenge by showing its manifest error or fraud or by establishing by other evidence its error. Whether it is prima facie or conclusive proof of the debt, it shifts the burden on the first defendant to show how the sum claimed is incorrect. In this regard I am, with respect, unable to follow the decision of *Malayan Banking Bhd v Yeo Sun Tong* [1999] 6 MLJ 377 where it held that notwithstanding F the existence of such a provision a plaintiff must still set 'full particulars of the debt' in the statement of claim before summary judgment can be obtained. In coming to that decision, the learned judge there appears to be of the view that he is supported by the Court of Appeal decision in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ G 363. But I am of the view that the case does not. In fact the case reiterated the principle concerning the conclusiveness of such a certificate and the onus being on the party seeking to challenge the certificate to prove that the certificate is erroneous or fraudulent. The Court of Appeal referred to two cases, *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72 and *Bank of Commerce (M) Bhd v Tan Boon Soon* [1995] 1 AMR 156, H where the High Court refused to accept the conclusiveness of the certificate and said, at p 370, that it was because 'there was evidence of manifest error.' Thus, none of the cases referred to can support the proposition that unless the full particulars of the debt are set out in the statement of the claim summary judgment cannot be had. The first defendant then contended that the certificate 'is riddled with manifest errors' because the letter of demand I adverted to a commitment fee being payable when the term loan and bridging loan tranche A did not mention such and in any case it should not be payable after the date of judgment, as claimed by the plaintiffs, since the loan was recalled. This, it was also contended, has the effect of rendering the letter of demand invalid and unlawful as well, which question I will deal with later. It is a term of the loan agreement, s 10.01 that the first defendant pays various charges called management fee, participation fee, commitment fee and an agency fee. Therefore, there is no substance in the contention that such is not provided. That section says:

> The Borrower agrees to pay to:
>
> (a) the managers a management fee in the amount provided in the letter dated 21 April, 1995 from the agent to the borrower for their own account during the tenure of the facilities. The first of such management fee shall be payable upon the execution of this agreement and thereafter at each twelve (12) monthly interval;
>
> (b) the agent for the pro rata account of the lenders a participation fee of one-quarter of one per centum ($^1/_4$%) per annum of the relative commitment in the facilities for the account of the lenders respectively, such fee to be paid upon execution of this agreement;
>
> (c) the Agent an agency fee in the amount provided in the letter dated 21 April, 1995 from the agent to the borrower upon the execution of this agreement and hereafter at each twelve (12) monthly interval; and
>
> (d) the Agent for the account of the lenders a commitment fee of one-quarter of one per centum ($^1/_4$%) pa on the unutilised portion of the facilities from the date the same or any part of them are available during the availability period payable quarterly in arrears and shall be calculated on the actual number of days elapsed.

What I said earlier about the burden on the part of the first defendant to produce at least some semblance of evidence to show error or fraud applies as well and the first defendant had failed to do so. It will be noticed that there is no post-judgment claim for such fees.

The first defendant also posed the question of whether such fees are chargeable after the loan was recalled but it depends on whether such were in fact charged. The certificate has the effect of shifting the burden on the part of the first defendant to establish that and, as I have said earlier, it is a mere matter of calculation from statements of accounts which the first defendant had been supplied; the first defendant had failed to discharge that burden and had therefore failed to raise any issue for trial regarding the amount due. In fact, this matter is not raised in the defence nor in any affidavits.

That takes me to the next question on the same subject of the conclusiveness of the certificate. It appears to me that there is a challenge to the certificate when the first defendant alleged the plaintiffs 'insisted on charging exorbitant cost of funds and base lending rate as pleaded in the statement of claim despite the sharp drop in the same ... over the last few months shows the plaintiffs' ... tendency to charge excessive interest'. In support of that contention, the first defendant relied on the averments of the affidavits filed on behalf of the third defendant which relevant parts are in these words:

> 23 Furthermore the plaintiffs had further failed to disclose to this Honourable Court the fact that the interest rates had fallen recently but

> the plaintiffs had wrongfully suppressed this fact from this Honourable Court with a view to extracting a higher rate of interest that the current reduced interest rates. A
>
> ...
>
> 7 To further elaborate on para 23 of my second affidavit knowledge, the third defendant states that it is common knowledge that the interest rates for financial institutions have dropped substantially and the Base Lending Rates have fallen to just over 9% early this month (September 1998). Further the Statutory Reserves Requirements have also been reduced by Bank Negara recently and this would effectively reduce the financial institutions' Costs of Funds. A copy of the newspaper reports dated 28 August 1998 and 12 September 1998 extracted from 'The Star' newspaper evidencing the above is shown to me and annexed herein collectively as exh 'MB-1'. B C

The plaintiffs then replied that the margin and cost of fund and the margin and base lending rates mentioned in the statement of claim are as at 16 March 1998 whereas the said newspaper cutting referred to a period after that date for which period the claim did not cover save for the continuing interest after 16 March 1998 for which the plaintiffs continue to claim interest based on a fixed base lending rate. In so far as the claim for the amount up to 16 March 1998 the first defendant had not offered any evidence which could be considered as pointing to any manifest error or fraud on the sum certified as being due. It was a very simple exercise, if there really was excess interest charged, of obtaining the readily available pronouncement of Bank Negara relating to various rates and from there to work out the sums due from the first defendant. There was nothing complicated about that task for which the first defendant carries the burden of establishing error or fraud, in relation to a period of slightly more than two years, so as to be entitled to a trial. The first defendant had failed to do so. D E F

As for interest after 16 March 1998, it was based on the same rate as that pertaining on 16 March 1998 and these are:

first plaintiff — cost of fund @13.66 % plus 2% = 15.66%

second plaintiff — base lending rate of 12% plus 2% = 14% G

third plaintiff — base lending rate of 12% plus 2% = 14%

fourth plaintiff — base lending rate of 14.3% plus 1.5% = 15.8%

It is a notorious fact that the base lending rate of a bank changes from time to time. So too the cost of fund. Unless there is a provision in the loan agreement to say that the said rates shall apply irrespective of what the actual rates are from time to time, I am of the view that it is arguable whether the plaintiffs are entitled to that interest after 16 March 1998. In this regard the first defendant, in introducing the said affidavit evidence and the newspaper cutting, has established sufficient facts to raise a triable issue regarding those interests. Ms Phang had argued that the post-judgment interest had to be fixed in view of the decision of *Tuan Hj Ahmed Abdul Rahman v Arab Malaysian Finance Bhd* [1996] 1 MLJ 30 where it was held that a default judgment awarding contractual interest at a fluctuating rate H I

A was uncertain and a nullity. But the loan agreement provides for a fluctuating rate and unless it can be argued that, whether by implication or whatever, the rate should be fixed as argued by Ms Phang, and not fluctuating as provided under the loan agreement, it would be difficult to see how such a rate could be fixed. Clearly, the issue is triable.

B Another question which the first defendant said merited a trial is the 1% penalty interest which they contended is a penalty and can only be recovered upon proof of damages, citing *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461. The Federal Court in that case, at p 470, held that the default interest must be exorbitant for it to be a penalty. Section 75 of the Contracts Act 1950 gave an example C of exorbitant interest where the rate was increased from 12% to 75%. I had the occasion to deal with this question in the unreported case of *OCBC Bank (M) Bhd v Livision Sdn Bhd* (Suit No 24–87–98–III(I) Kuching High Court I, 22 August 1998) and where I concluded that the imposition of an additional 1% interest cannot be a penalty. What I said in that case with regard to the question of interest applies with equal force to the present case D and I do not propose to elaborate.

(3) Improper letter of demand

Learned counsel for the first defendant then contended that the letter dated 4 April 1998 demanding payment of the sum of RM22,148,93.69 is 'a E wrongful demand and therefore invalid'. That allegation is premised on the supposition that the demand included the said fees which were not provided and which were excessive. Both of which suppositions I have dealt with earlier and concluded to be without basis since s 10.01 does provide for the payment of such fees and since the certificate had not been shown to be F manifestly erroneous, not even just plain errors, or fraudulent.

Learned counsel for the first defendant had referred to several authorities on this matter of the letter of demand which I will consider now.

In *Co-operative Central Bank Ltd v Meng Kuang Properties Bhd* [1991] 2 MLJ 283 where a provision required the bank to serve a notice before any G default interest could be imposed and there was no evidence of such notice, the court there held that the demand was wrongful and invalid. In the present case, there is a provision for the variation of interest to be valid even if there was no notice.

In *United Malayan Banking Corp Bhd v Lim Meng Hua & Ors* [1990] H 1 MLJ 54, the question there was whether interest would continue to be payable by a defendant company that had been wound up. The present case is concerned with the rate of post-judgment interest for which I have already concluded that it is arguable.

Credit Corp (M) Bhd v Lucky Height Development Sdn Bhd & Ors [1996] 4 MLJ 556 concerned a case where the plaintiff admitted that the notice for I the variation of interest, which was a condition before the variation could be insisted on, was not sent. There was also no provision there, unlike the present case which has a s 9.04, to protect the right of the plaintiff to vary the interest notwithstanding a failure to give notice. This case is again of no assistance to the first defendant.

As for *Oriental Bank Bhd v Jaafar Sidek bin Mohd Salam & Ors* [1990] 2 CLJ 72, it is a case where summary judgment was obtained notwithstanding an unfulfilled demand for particulars of the statement of claim. The court there held that the particulars ought to be given and it held that the conclusive evidence clause does not prevent the questioning of the correctness of the account. In the present case it is common ground that there is a right to show error or fraud regarding the certificate. No error was shown. Again, the case is of no assistance to the matter at hand.

Therefore, it is unarguable that the letter of demand was validly issued.

Defence of second defendant

The second defendant apart from adopting those contentions of the first defendant, which I had earlier set out and dealt with, also, together with the fifth defendant, contended that the plaintiffs 'as bankers and chargee of properties of the first defendant/appellant owe a duty of care to the second defendant and fifth defendant to ensure that their acts or omissions will not prejudice the security upon which the second and fifth defendants/appellants stand as guarantors'. The duty, argued the two defendants, is imposed by the common law and under s 7.02 of the loan agreement which reads:

> Section 7.02 Additional conditions precedent to drawings on respective tranches
>
> In addition to the provisions of section 7.01 hereof, the several obligations of the Lenders to make their proportions of Commitment available shall also be subject to the fulfilment of the following conditions precedent —
>
> (a) Drawings on Tranche A
>
>   (i) The charges over Lots 21 and 25 both of Section 25 Kuching Town Land District shall have been presented for registration at the relevant Land Registry and searches conducted immediately prior to the presentation shall have confirmed that the said Lots 21 and 25 both of Section 25 Kuching Town Land District are free from encumbrances.
>
>   (ii) The Borrower shall have paid the differential sum between the Term Loan Facility and the purchase price in respect of Lots 1, 2, 4, 6, 7, 8, 9, 13 and 14 all of Section 25 Kuching Town Land District.
>
>   (iii) The contractor for the construction of the trade centre shall be acceptable to the agent.
>
>   (iv) The following relevant documents shall have been duly received by the agent and the lenders to their satisfaction and appropriate searches have been made at the relevant land registry and the companies registry that the said land as well as the other assets to be charged as security were free from encumbrances:
>
>   (1) Certified true copies of the sale and purchase agreements duly executed by the borrower and the respective registered proprietors of Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14 and 26 all

of Section 25 Kuching Town Land District and terms and conditions of which shall be acceptable to the agent;

(2) A certified true copy of the joint-venture agreement between the land custody & development authority and the borrower the terms and conditions of which shall be acceptable to the agent;

(3) Valuation reports addressed directly to the agent on the said land based on the approval of the proposed development of the trade centre and the complex confirming the market value to be not less than RM Twenty Million (RM20,000,000).

(4) A cost analysis report on the development of the trade centre and the complex from a registered quantity surveyor and the report shall be acceptable to the agent;

(5) Certification from an auditor acceptable to the agent and the lenders certifying that the paid-up capital of the borrower is not less than Ringgit Malayia Five Million (RM5,000,000);

(6) All the requisite permits, licenses, approved engineering plans and building plans for the construction of the trade centre and the complex;

(7) Upon commencement of the construction works on the trade centre and the complex, a contractors' all risks insurance policy from an insurance company acceptable to the agent with the security agent's interests as loss payee endorsed thereon;

(8) Satisfactory evidence that the shareholding in the borrower held by the land custody & development authority is at least twenty per centum (20%); and

(9) A project account shall be opened with a commercial bank to be jointly operated by the agent and the borrower to capture all the sale proceeds arising from the sale of floor spaces in the trade centre.

(b) Drawings on Tranche B

(i) The Charges over Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14 and 26 all of Section 25 Kuching Town Land District shall have been presented for registration at the relevant Land Registry and searches conducted immediately prior to the presentation revealed that the said Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14 and 26 all of Section 25 Kuching Town Land District are free from encumbrances.

(ii) The following relevant documents shall have been duly received by the Agent and the Lenders to their satisfaction —

(1) Satisfactory evidence that at least seventy-two per centum (72%) of the floor space of the Complex has been occupied by an anchor tenant.

(2) The tenancy agreement to be entered into between the Borrower and the anchor tenant of the Complex shall be acceptable to the Agent.

(3) Assignment of Rental Proceeds.

(4) The Contractor for the construction of the Complex shall be acceptable to the Agent.

It was argued that the duties of the plaintiffs consisted of: A

(1) ensuring that all the requisite permits and licences for the construction of the trade centre have been fully approved by the relevant authorities before any drawdown of the bridging loan; and

(2) ensuring that the trade centre is constructed lawfully. B

It will be assumed that the specific provision relied on is s 7.02 (a)(iv)(6) which speaks of the fulfillment by the first defendant of the condition — 'All the requisite permits, licenses, approved engineering plans and building plans for the construction of the trade centre and complex.' — before the first defendant can draw on the loan. But the condition, according to s 7.01 (as amended), relating to the submission of the engineering plan before the C drawdown of the loan, may be waived by the plaintiffs. Thus, the complaint directed at the non-submission of the engineering plan is of no merit since the first defendant and the plaintiffs have agreed that the same may be waived. There is no question of any breach of any contractual duty. This leaves only the second alleged duty to ensure that the trade centre was built in conformity with the relevant laws and by-laws. There is nothing in s 7.02 D or any other sections of the loan agreement which lays down a duty on the part of the plaintiffs to ensure that the trade centre was built in conformity with the relevant laws and by-laws. In any event, the loan agreement is not a contract between the plaintiffs and the second defendant or fifth defendant and it cannot be comprehended how such a contract can give rise E to contractual obligations on the part of the plaintiffs to the second defendant or the fifth defendant. This leaves only the position at common law to be considered. But before that I will deal with the contention of the plaintiffs' counsel that this defence was not even pleaded and so cannot be argued.

In *Pernas Sime Darby Holdings Sdn Bhd v M Poovanandran* [1986] F 1 MLJ 418, the defence to a claim for a liquidated sum was a denial of the debt and putting the plaintiff to strict proof. The court there held that there was no indication as to the nature of the defence and that it was a sham. The defence was struck off. The court there at p 419 said this:

> The defendant filed an affidavit....which purports to improve the statement of G defence. I am unable to consider the affidavit evidence in the instant case. In *UMBC v Palm & Vegetable Oils*, Raja Azlan Shah Ag LP, as he then was, in delivering the judgment of the Federal Court, said, at p 207, '... we cannot but observe that any defect or omission in the statement of claim cannot be made good by affidavit evidence'.

H

A similar decision was made in *Pembinaan Jaya Sdn Bhd v Binawisma Development Sdn Bhd* [1987] 2 CLJ 446, citing also as authority *United Malayan Banking Corp Bhd v Palm & Vegetable Oil (M) Sdn Bhd & Ors* [1983] 1 MLJ 206.

It has to be determined whether *UMBC v Palm & Vegetable Oil* can be authority for the proposition, which the two cases appear to assert, that the I defence cannot be improved by affidavit in opposition to a summary judgment application. *UMBC v Palm & Vegetable Oil* concerned a statement of claim which did not state the sale of certain securities but when applying for summary judgment the plaintiff gave credit for the proceeds realised; thus, claiming a sum much less than that pleaded in the statement of claim. One of the defence was that there was no genuine sale of the securities and full credit was not given. The Federal Court held that the High Court was right in giving unconditional leave to defend. The Federal Court there said that any defect or omission in the statement of claim cannot be made good by affidavit evidence and that they should have been an amendment to the statement of claim. Thus, it is clear that the case had nothing to do with a defendant showing cause against summary judgment. Therefore, that case cannot be relied on for the proposition of law made by the two cases. Those two cases did not advert to the requirements of O 14 of the Rules of the High Court 1980. They also did not refer to the Federal Court case of *Alliance (M) Engineering Co v San Development Sdn Bhd* [1974] 2 MLJ 94 where it was held that cause against summary judgment could be shown by affidavit or preliminary objection.

It was left to *Lin Secuirites (Pte) v Noone & Co. Sdn Bhd* [1989] 1 MLJ 321 to do so. Though the two cases were not referred to it is obvious that they were not followed because the court there held that O 14 r 4(1) provides that a defendant may show cause against an application for summary judgment by affidavit or otherwise and that a defendant is entitled to show over and above what has been pleaded in the defence. That, I am of the respectful view, states the law correctly. The wordings of O 14 are clear enough as permitting that interpretation. The affidavit can show cause in respect of matters not raised in the defence.

In arguing that a duty of care exists, learned counsel referred to *United Malayan Banking Corp Bhd v Pembinaan KSY Sdn Bhd & Ors* [1993] 3 MLJ 45 which concerned, among other things, the refusal by a bank to comply with a request to sell the shares, which were used as securities for a loan, at an earlier date but instead sold them only later at a lower price. It was held that it is a triable issue whether the appellant owed a duty of care to the respondent, and if so, whether that duty of care had been properly or reasonably exercised in obtaining the best price for the said shares. The present case is not concerned with the sale of shares at the best possible price but with the question of the observation of the various laws concerning the construction of a building. So factually, that case has no relevance.

For the argument based on common law duty, the second defendant and fifth defendant had relied on the affidavit filed on behalf of the third defendant which stated that 'the building is built without proper approval or no approval at all from the relevant authorities, and hence, the building is an illegal building'. The deponent had earlier said the project of the first defendant had encroached on state land and consequently the occupation permit could not be issued. In considering whether a common law duty of care existed, the relationship of the second defendant and the plaintiffs must be considered. The second defendant had shareholding in the first defendant and the first defendant had undertaken and covenanted with the plaintiffs that they would carry on and operate their business and affairs with due diligence, efficiently and in accordance with the bylaws and regulations. The fifth defendant sat in boards of the first defendant and second defendant as director. The first defendant, as mentioned earlier, was in the business of property development while the plaintiffs are institutions governed by the Banking and Financial Institutions Act 1989 and the Central Bank of Malaysia Act 1958 and those acts lay down what they can or cannot do.

The propositions of the duty of care involve: (1) the obtaining of all relevant permissions for the construction and occupation of the building; and (2) the proper supervision of the construction works to ensure that the buildings were not constructed as to encroach on someone else's land. In so far as the first defendant was concerned it could be expected that they would employ architects, engineers and surveyors for the purpose of the project and the second defendant, being a shareholder of the first defendant, would no doubt see to it that everything was done properly. The second defendant's interest was expected to be looked after by the fifth defendant who was a director of both the first defendant and the second defendant. Therefore, the welfare of the first defendant and second defendant were in the hands of the board of directors of the first defendant of which the fifth defendant was a member. It is beyond argument that it can be assumed that the board of directors of the first defendant would have met to consider the credentials of the various professionals whom they finally engaged for the project. So it was the decision of the first defendant and that of the fifth defendant as well to employ those professionals. Though it was not said, it would be assumed that those professionals concerned were at fault in allowing constructing of the building with part encroaching on other people's land. One cannot be faulted for trusting those professionals and one was not expected to double-check every drawing or survey they made One was entitled to expect them to carry out their jobs professionally and not negligently. Unless one was on the site everyday, it was impossible to monitor the progress of the work and to see whether they were in conformity with the drawings and plans. For that purpose, you would have a clerk of work and the professionals already engaged. Therefore, if something was to go wrong, say, a 5 cm steel bar was used by a contractor instead of a 10 cm steel bar, the professionals concerned could not turn round to say to the first defendant or the fifth defendant that it was their fault for not discovering the non-conformity. Take another example of a part of the building being constructed on other people's land. Unless the boundary was properly laid out on the ground, it would not be possible for a layman to discern it but a surveyor with his equipment would know. Therefore, if the first defendant or the fifth defendant were to miss the fact that the building was constructed outside the land of the first defendant, it would not be opened to the surveyor to say that it was the fault of the first defendant or fifth defendant in not ensuring that the building was constructed within the proper boundary. Then you have the situation of the first defendant and the fifth defendant not challenging the engineer or architect who issued the certificates for progressive payment. Again the first defendant and the fifth defendant could not be faulted for not challenging since they were entitled to rely on those professionals. Given such a situation, it is even less justifiable for the first defendant or fifth defendant to blame the plaintiffs. Such a situation could not justify the imposition of care on the part of the plaintiffs to the first defendant and fifth defendant to ensure that the professionals, whom the first defendant employed and which decision the fifth defendant could be taken to have accepted if not taken part in, carried out their duties. Therefore, there was no duty on the part of the plaintiffs to ensure: (1) the obtaining of all relevant permissions for the construction and occupation of the building; and (2) the proper supervision of the construction works to ensure that the buildings were not constructed as to encroach on someone else's land. If there was any blameworthy failure on the part of the persons other than the professionals, then the first defendant and the fifth defendant would be entities responsible since they made the decisions appointing the professionals and the first defendant had undertaken to carry out its property development properly. It would be strange law that their failure could ground an action against the plaintiffs. It would amount to imposing a duty on the plaintiffs to ensure that the first defendant or fifth defendant carried on their business properly and to allow the first defendant and the fifth defendant to sue the plaintiffs in the event that the first defendant and the fifth defendant were not doing so. If the first defendant and the fifth defendant, who were in control of the professionals and of the property development, were not at fault, how could the plaintiffs be at fault? Furthermore, it was the duty of the first defendant under the laws concerned to obtain whatever permission that was required for the construction and occupation of the building and to allow their failure to do so to ground an action against the plaintiffs would be against both logic and against accepted social norm. I am not unaware that it is always open to the courts to expand the existing area of liability by the creation of new duty-situations but, for the reasons I have already stated, it would not be conducive to acceptable norms.

Defence of third defendant

The issues which the third defendant contended should go for trial are: (1) whether the claim is premature; (2) whether there is any collateral agreement and, if so, whether there is any breach; (3) whether the plaintiffs owe the third defendant a duty of care, and if so, whether there is a breach of such duty; (4) whether the claim is excessive and proven; and (5) whether there is any proper demand made on the third defendant for payment.

Issue (1) is dependent on the argument that the loan is for ten years and that before the expiry of that period the plaintiffs cannot demand repayment, which argument I had already, when it was raised by the first defendant, found to be unsustainable. It was also earlier similarly decided with regard to issue (4) that it was not arguable. This leaves only the contentions relating to issues (2), (3) and (5).

Contention (2)

The third defendant's contention is that there was a collateral understanding based on the factual matrix and the representations of the plaintiffs that in connection to the guarantee given by the third defendant:

(i) that the plaintiffs would ensure and/or take reasonable care to ensure that first defendant comply with all the relevant applicable rules, regulations and law and that the project would not be adversely affected by the failure to abide by such rules,

(ii) that the plaintiffs would take the necessary precautions as prudent financiers to ensure that all requisite permits, licences and building plans for the construction of the trade centre and the complex are obtained before allowing a drawdown of the loan;

(iii) that the plaintiffs would ensure and take all reasonable care to ensure that the building would be lawfully and properly completed and not built illegally and/or contrary to the applicable rules, regulations and laws so that the proceeds from the sale and purchase agreement relating to the relevant properties and proceeds of rental would be utilised to repay the loans; and

(iv) that the specific period of the term loans and bridging loan facilities shall be a period of ten years from the date of first drawdown to facilitate (iii) above and also due to the period required by the first defendant to recoup the investment and the limited cash flow of the first defendant.

Mr Anthony Ting, learned counsel for the third defendant, referred the court to *Eushun Properties Sdn Bhd v MBf Finance Bhd* and*Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (FC) where it was held that notwithstanding s 92 of the Evidence Act 1950, a collateral agreement can exist side by side with a main agreement and even where it contradicts the main agreement. The very basis of a collateral agreement is that a representation, whether by words or conduct, was made that was not incorporated into the main agreement. This was the basis of the decision in *Eushun Properties Sdn Bhd v MBf Finance Bhd* at p 141, where the court referred to such assertions having been made. This is different from the terms to be implied which I have earlier dealt with when considering the contention of the first defendant and if the third defendant were to contend that such a term was to be implied, then for the same reasons I would say it cannot. But I am of the view that the argument of the third defendant is based on representations having been made and these representations constituted the collateral agreement.

What, then, are the representations that are alleged to have been made and by which officers of the plaintiffs? Mr Mustapha bin Awang Besar, the general manager of the third defendant, affirmed three affidavits, respectively on 29 July, 27 August and 26 September 1998 and it is those affidavits that I will try and unearth under what circumstances, when and by whom those alleged representations (i) to (iv), were made. This is because learned counsel for he third defendant had submitted that 'the plaintiffs gave assurances to the third defendant before the third defendant agreed to enter into the proportionate guarantee that they would, inter alia, see that all things are properly done with respect to the approvals, permits, licences and building plans for the construction of the trade centre and the complex are obtained before a drawdown is allowed on the loan as a condition precedent'. It will be assumed that the word 'assurances' used there is equated with the term 'representations' which was used in the affidavits.

One term of the alleged collateral agreement is that there must be no drawdown of the loan by the first defendant until all the necessary permits and licences are obtained and this term came from the loan agreement as varied by cl 4.5 of the letter dated 5 December 1995. This December 5 letter can be considered as issuing from the plaintiffs and it is addressed to the first defendant and copied to all the other defendants. The relevant terms of the letter can be summarised this way:

(1) the loan agreement is to be varied in the terms set out in the letter;

(2) the condition of the 'submission of the approved engineering plan in respect of the development of the trade centre and the complex' before the drawdown of tranche A is to be waived subject to prior consent of all the other defendants;

(3) the drawdown of tranche A is only to be made after 'All the requisite permits and licenses for the construction of the trade centre and the complex' shall have been received by the plaintiffs.

It is common ground that all the defendants had agreed to the variations set out in the letter. Apart from the submission of the engineering plans, the other permits and licences required, according to the third defendant, are:

(1) approval for the draft plans;

(2) approval for the engineering plans (which can only be done after the survey plan had been deposited with the land & survey department); and

(3) approval for the building plan (which can only be done after the approval of the engineering plans).

The third defendant alleged that none of these approvals were obtained and despite that the plaintiffs had allowed the first defendant to draw on the loan. In answer, learned counsel for the plaintiffs raised the same pleading point of which I have dealt with earlier. In addition learned counsel submitted that the plaintiffs under s 7.01 (as amended or added by the December 5 letter, had the absolute discretion to waive those requirements. But the waiver was, among others, in respect of the submission of the approved engineering plan but not in respect of the other matters enumerated as (1) and (3) above. That was the only relevant answer provided by the learned counsel for the plaintiffs. The other, like the prohibition of s 92 of the Evidence Act 1950, has no relevance when a collateral agreement is sought to be established. Therefore, I cannot say that there is no arguable issue concerning the alleged collateral agreement urged by the third defendant which has been set up as relieving the third defendant from liability.

The third defendant also contended that there was a failure to particularise the claim giving rise to the contention that the claim was excessive which point I have already dealt with earlier and found it to be unarguable. However, as I have also found earlier, it is an arguable issue as regards the rate or amount of the interest payable after 16 March 1998. A

Contention (3): Duty of care

Since this contention is closely linked with the issue of collateral agreement which I found is arguable, it should follow that this is also an arguable issue. B

Contention (5): Whether demand for payment made

The third defendant denied receiving the notice of demand dated 4 April 1998. The plaintiffs exhibited a postal receipt which they alleged show the posting of the letter and relied on the deeming provision of cl 22 of the guarantee which says: C

> Any notice demand or request permitted to be given or made under this guarantee & indemnity shall be in writing and shall be sufficiently given or made to the guarantors by hand or registered post addressed to the guarantors at the addresses as shown in Section 1 of the schedule hereto and shall in such event be deemed to have been served on and duly received by the guarantors at the time when such registered letter would in the ordinary course of post be delivered. D

The third defendant in effect contended that the plaintiffs must prove that the letter was enclosed in an envelope which was addressed to the third defendant at the address stipulated in the guarantee. This, according to the third defendant, the plaintiffs failed to do so since the postal receipt did not state the address nor the full name of the third defendant. It was further submitted that no AR acknowledgement card was exhibited which would have gone to show the service, the address to which the letter was posted and to whom it was posted. This, the third defendant maintained, is the position notwithstanding the fact that cl 4 of the guarantee expressly stated that no prior demand is necessary because that clause 'is invalid because of the contra-proferentum rule and that the guarantee is clearly 'on demand' guarantee'. Various cases were referred to for support of the propositions made on behalf of the third defendant. E F

The case of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 dealt with a notice which was not sent to the address given in the guarantee and the guarantor there denied receiving it and the court there held that since a demand is a necessary precondition for payment and the posting to the address given in the guarantee is a condition for the operation of the deeming provision and it was not done, it became a triable issue whether a demand was made and received. In the present case, the letter bore the address given in the guarantee. Furthermore there is provision here dispensing with a demand which is not present in that case. Therefore, that case is of no assistance to the third defendant nor does it support the contention that the dispensation with demand is invalid. G H

The plaintiffs relied on *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 (FC) where it was held that a demand had been properly addressed and posted to the address the parties agree, then the deeming I provisions operated to regard the demand as having been served even if the guarantor had not received it. Therefore, the fact that the third defendant had not received it, a point emphasised by the third defendant, is of no consequence. The only relevant point is whether it was posted to the address concerned. The posting was done by Jasenu Kisni, a clerk of Reddi & Co, the advocates acting for the plaintiffs, and he deposed an affidavit to say this:

> I confirm that all the letters ... were posted by me to ... the third defendant ... at the General Post Office on the same day as the date of the respective letters. (Copies of the postal receipts ... are annexed hereto ...

It will be noticed that he did not say that the letter which was addressed as provided under the guarantee was put in an envelope which was addressed to the third defendant and bearing the same address. In my view, it is not only addressing the demand to the agreed address but posting it as well is vital for the deeming provision to apply. Unfortunately, there is no evidence that the envelope containing the letter of demand was so addressed. So it is arguable whether the demand was posted to the address given in the guarantee but, as mentioned earlier, there is no need for a demand before an action can be commenced to recover the debt.

In so far as the third defendant is concerned, they are entitled to a trial save issues which I have decided are unarguable and which I will enumerate at the end of the this judgment. I turn now to the fourth defendant.

Defence of fourth defendant

Mr Wong Siong Tung, learned counsel for the fourth defendant said that the following issues should go for trial, viz:

(1) the guarantee 'has been procured on behalf of the plaintiffs from the fourth defendant by unlawful alteration of the consent of the minister for resource planning';

(2) the guarantee 'has been procured on behalf of the plaintiffs from the fourth defendant by misrepresentation resulted from the wrong impression created by unlawful alteration of the consent of the minister for resource planning';

(3) the guarantee 'was rescinded by mutual agreement whether expressed or implied; and

(4) the guarantee 'was in respect of a liability which is uncertain and therefore unenforceable'.

The contentions (1) and (2) can be considered together as they concern a statutory consent. The fourth defendant is a statutory body established under the Sarawak Land Custody and Development Authority Ordinance 1981. When the plaintiffs in April 1995 offered to the first defendant the loan, the second defendant, which was effectively in control of the first defendant, was negotiating with the fourth defendant for the joint development of the project. This resulted in the fourth defendant investing in 20% of the equity of the first defendant with the shares issued to a subsidiary of the fourth defendant. The fourth defendant paid the first defendant a sum of RM600,000 on 27 June 1995 for the equity. The fourth defendant's learned counsel maintained that that was only an agreement to use the first defendant as the joint venture company but that the second defendant and the fourth defendant had yet to agree on the development and the shareholdings but learned counsel did not explain why the fourth defendant should pay RM600,000 to take up the equity when those matters had not been agreed upon. It was submitted for the purpose of supporting the contention that the fourth defendant had no say or control over the affairs of the first defendant before 10 November 1995, particularly with regard to the loan offered by the plaintiffs. Therefore, when the first defendant executed the loan agreement on 13 July 1995, the fourth defendant had no say in it. But s 1.04 of the loan agreement provided, among other things, for a corporate guarantee to be executed by the fourth defendant simultaneously with the loan agreement. Though the guarantee was provided, it was only executed on 31 October 1995 which was some months after the execution of the loan agreement. The delay was because the consent of the Chief Minister for the execution of the guarantee was not obtained until 20 September 1995. The consent is in these terms:

> *Land Custody And Development Authority Ordinance 1981*
>
> *(Ordinance No 4 of 1981)*
>
> Approval to Guarantee By Land Custody and Development Authority [s 10(I) (m)]
>
> Whereas the Land Custody and Development Authority ('PELITA') holds twenty percent (20%) of the paid up share capital of Court Square Pelita Sdn Bhd (formerly known as Court Square Sdn Bhd (hereinafter called 'the Company');
>
> *And whereas* the company has applied to the financial institutions whose names are set out in the SCHEDULE hereto (hereinafter collectively called 'the Lenders' for loan facilities.
>
> *And whereas* by a facilities agreement to be entered between (1) the Company (2) Arab-Malaysian Merchant Bank Berhad ('AMMB') as agents (3) AMMB and Interfinance Berhad as managers (4) the lenders and (5) AMMB as security agent and trustee for the Lenders and which shall include all subsequent amendments to the facilities agreement, the lenders agree to grant to the company a term loan facility of RM8,400,000 and a bridging loan of RM 46,600,000.
>
> *And whereas* the Company has intimated its acceptance of the terms and conditions contained in the Facilities Agreement.
>
> *Now in the exercise of the power* conferred on me by the Land Custody and Development Authority Ordinance (Ordinance No 4 of 1981) under s 10(1)(m), I, YAB Datuk Patinggi Tan Sri Haji Abdul Taib Mahmud, the Minister for the time being charged with the responsibility for the Land Custody and Development Authority under Section 2 of the above Ordinance Do Hereby Give Consent to PELITA to execute the corporate guarantee and indemnity favouring AMMB as security agent and trustee for the lenders in respect of the facilities now being given or to be given to the company together with all interests, costs and other sums of money payable thereunder provided always that PELITA's obligation to repay under the said corporate guarantee

> and Indemnity shall not be more than twenty percent (20%) on all sums of money owing in respect of the facilities.
>
> Given under my hand the 20th day of September, 1995
>
> (Signed):
> (YAB Datuk Paginggi Tan Sri Haji Abdul Taib Mahmud)
> *Chief Minister and Minister for Resource Planning*

The words '*to be entered*' which I have italicised were changed by the erstwhile advocates for the plaintiffs to 'entered into' to take into account the fact that the loan agreement had already been executed. This alteration was not authorized by the chief minister who had signed the consent. This, according to learned counsel for the fourth defendant, had the result of impressing upon the fourth defendant that the chief minister had perused, considered and approved the loan agreement resulting in the fourth defendant not further perusing or negotiating the terms for the loan. It was contended that because of the unauthorised alteration the consent was void and lacking and the fourth defendant is not liable under the guarantee. It was further contended that because the fourth defendant was misled into thinking that consent was already obtained for the loan agreement already executed when in fact the consent was to guarantee a loan agreement yet to be executed, it amounted to a misrepresentation by the plaintiffs and the guarantee is invalid by virtue of s 95 of the Contracts Act 1950. The erst while lawyer who made the alteration had said that it was done after she had obtained the consent of Robert Elone Sireng, the property manager of the fourth defendant. This event was narrated in the following letter of that lawyer to the fourth defendant:

> 18 October 1995
>
> Re: Resolution of LCDA
>
> Dated: 20 September 1995
>
> This is to confirm the telephone conversation on 18 October 1995 between your En Robert Elone & our Miss NJ Au that the words 'to be entered' appearing in the first line of para 3 of the resolution of LCDA dated 20 September 1995 are to be amended to 'entered into'. This is because the Facilities Agreement had already been signed, stamped and dated 13 July 1995.
>
> We have made the amendment on the original resolution and enclose herewith a photocopy of the amended resolution for your files.
>
> Please acknowledge receipt by signing and returning the duplicate thereof.
>
> Yours faithfully
> Goh & Partners Advocates
>
> (Signed):
> NJ AU (Miss)
>
> Encl

Though that letter referred to a resolution, it is not disputed that it was intended to refer to the consent. It is, to say the least, amazing that a lawyer could believe she had the authority to amend a public document without obtaining the consent of the public officer who signed it but instead was happy with the consent of someone, a property manager at that, who did not and who had no authority to sign it. The property manager denied ever agreeing to amending the consent. With those allegations in mind and taking the version of the fourth defendant are there triable issues?

For the fourth defendant to succeed it has to be shown that it is illegal for the fourth defendant to give a guarantee without the consent of the chief minister. The fourth defendant could not point to any such provision in the law. In fact, as pointed out by learned counsel for the plaintiffs, no consent is required where the guarantee is within such limits as the chief minister has fixed (s 10(1)(m) of the Sarawak Land Custody and Development Ordinance). It is not the case for the fourth defendant that the guarantee given was in excess of the amount fixed. In fact, that it was a proportionate guarantee shows that it was within the approved limit. Therefore, it is not arguable that the guarantee is illegal and unenforceable because of the lack of a consent.

As for the alleged 'misrepresentation', the representation which the plaintiffs were alleged to have made through the said alteration of the consent is that the chief minister had perused, considered and approved the loan agreement that was already signed; that, at least, was the impression the fourth defendant had. Impression properly formed from negotiation with someone can be the basis of a representation (*Kluang Wood Products Sdn Bhd v Hong Leong Finance Bhd* [1999] 1 MLJ 193 at p 222 (FC)). It can be assumed at the present moment that there was such a representation. Is that representation a false representation? That depends on whether the chief minister had perused, considered and approved the loan agreement that was already signed. What, then, are the evidence which the fourth defendant relies on showing that the chief minister had not perused, considered and approved the loan agreement as to make the representation a misrepresentation? Learned counsel for the fourth defendant did not say any thing in this regard, and, not surprisingly, because despite the bundles of affidavits and exhibits, there was not a shred of evidence to remotely show that the chief minister had not perused, considered and approved the loan agreement. There is still another reason why this defence of misrepresentation is not arguable. Not only should there be a misrepresentation but that the misrepresentation must have induced the signing of the guarantee. In order for the fourth defendant to be induced, there must be some minds capable of being induced and these people would usually be the persons who had dealt with the matters relating to the guarantee. Again learned counsel did not point to anything that could be considered as evidence to support the contention that such and such persons acting for the fourth defendant were induced into signing the guarantee on account of the misrepresentation.

The next issue concerns the allegation that the guarantee was mutually rescinded. Certain events have to be recapped in order to comprehend the arguments relating to this question of rescission. The loan agreement was

A executed on 13 July 1995 but this was followed by the December 5 letter (which is a date after the fourth defendant had executed the guarantee) which relevant terms are these:

> [Addressed to first defendant Etc …]
>
> 5 December 1995
>
> B [Etc …]
>
> We refer to the Facilities Agreement dated 13 July 1995 … .
>
> All words and expressions used herein shall save where the context otherwise requires bear the meaning as defined in the Facilities Agreement.
>
> C We are pleased to advise you that the Lenders have at your request agreed to vary the terms and conditions of the Facilities Agreement in the manner following —
>
> [Etc …]
>
> The above amendments are conditional on the prior written consents of all the Guarantors being obtained.
>
> D [Etc …]
>
> In addition, the Schedule 1 of the Facilities Agreement is amended as per the revised schedule attached hereto as Appendix I.
>
> The above amendments shall apply mutatis mutandis to the Security Documents and all other documents executed or to be executed by the E Borrower and the Security Party. All other terms and conditions of the Facilities Agreement and the Security Documents shall remained unchanged.
>
> Kindly indicate your acceptance of the terms and conditions herein by signing and returning to us the original of this letter by 12 December 1995.

The fourth defendant signified their consent by a letter dated 10 January F 1996, viz:

> We, Land Custody and Development Authority, … one of the Guarantors of the Facilities hereby acknowledge that the varied terms and conditions of the Facilities as stipulated in … Supplemental Letter of Offer dated 5th December, 1995 have been intimated to us and we hereby consent to the same.
>
> G We further agree to be bound by the terms and conditions of the respective Guarantees executed by us.
>
> (Signed by authorised persons of fourth defendant.)

How could the fourth defendant, then, validly maintain that the effect of the H December 5 letter was to rescind the guarantee the fourth defendant had already executed. All the written terms expressly provide for the continuing validity of the guarantee. Not only that, the fourth defendant themselves had also subsequently agreed to the variation and confirmed the continuing validity of the guarantee. It is absolutely of no substance or merit the contention of the fourth defendant that the guarantee was rescinded or that I the guarantee was 'not intended at all to be covered by' the guarantee. The other arguments of the fourth defendant related to this point do not merit mention and are also of no substance. There is no triable issue here.

A The final contention of the fourth defendant is that the guarantee is uncertain and therefore unenforceable. I need only refer and reproduce certain parts of the guarantee which would serve to put an end to any pretence of the matter being arguable, viz:

> [Etc ...]
> B IN CONSIDERATION OF the ... 'Lenders'... having ... agreed ... in making available to [the first defendant] ...banking facilities up to Ringgit Malaysia Fifty-Five Million only ... (... 'the Facilities' ...) ... we, the Guarantors ... HEREBY JOINTLY AND SEVERALLY AGREE UNDERTAKE and GUARANTEE ...
>
> (i) the repayment and payment...of all principal sums interests ... in respect of the Facilities and under the provisions of the Security Documents ... C
>
> [Etc ...]

How can anyone, from the language used there argue that the guarantee is uncertain which means saying the guarantee does not refer to the RM55m, is beyond comprehension. Even assuming that one does not know what D amount is due under 'the provisions of the security documents', which is contended by the fourth defendant, one cannot dispute the amount falling due under 'the facilities'. I do not propose to dwell any further as it is totally devoid of merit. I turn now to the remaining contentions of the fifth defendant.

E

Defence of fifth defendant

The fifth defendant raised most of the issues which I have dealt with earlier and what I have said about them apply equally to the contentions of the fifth defendant. The only triable issue is the rate of interest payable after F 16 March 1998.

Conclusions

The appeal is allowed in part. Judgment should be entered for the respective plaintiffs against the respective defendants in the sums set out in the G following table:

H

No	Judgment for Plaintiff	Judgment against defendant	Amount (Malaysia Ringgit)
1	Arab-Malaysian Merchant Bank Bhd (first plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	4,172,501.15
		Impian Capital Sdn Bhd (second defendant)	2,336,600.64
		Land Custody & Development Authority (fourth defendant)	834,500.23

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2	Eon Bank Bhd (second plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	7,890,242.42
		Impian Capital Sdn Bhd (second defendant)	4,418,535.76
		Land Custody & Development Authority (fourth defendant)	1,578,048.48
3	Sabah Bank Berhad (third plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	6,016,665.81
		Impian Capital Sdn Bhd (second defendant)	3,369,332.85
		Land Custody & Development Authority (fourth defendant)	1,203,333.16
4	Interfinance Bhd (fourth plaintiff)	Court Square Pelita Sdn Bhd (first defendant)	4,069,384.31
		Impian Capital Sdn Bhd (second defendant)	2,278,855.21
		Land Custody & Development Authority (fourth defendant)	813,876.86
5	The first plaintiff, second plaintiff, third plaintiff and fourth plaintiff	Hanizah Abdul Hamid (fifth defendant)	22,148,793.69

The rate of interest payable by all those defendants to the plaintiffs from the 17 March 1998 shall be tried. To be tried as well and at the same time will be the claim of the plaintiffs against the third defendant save that all issues which I have already concluded to be unarguable, particularly respecting the amounts due and payable by the third defendant to the respective plaintiffs, cannot be raised by the third defendant at the trial and only the following issues shall be tried, viz:

(1) whether there was a collateral agreement (the detail of which I have already adverted to earlier) and, if so, whether there was any breach of the collateral agreement by the plaintiffs;

(2) whether the plaintiffs owed the third defendant a duty of care (the detail of which I have adverted to earlier) and, if so, whether there was a breach of such duty;

(3) whether breaches of such collateral agreement and or duty of care, if established, relieve the third defendant from their liability under the guarantee; and

(4) what rate of interest is payable by the third defendant to the plaintiffs as from 17 March 1998 in the event that the third defendant is found liable under the guarantee which amount of liability is in the several

> sums already set out in the table, supra, at the beginning of this judgment.

At the trial, the third defendant shall commence their case first since they carry the burden of establishing their assertions.

The question of costs, save for those relating to this appeal, will be dealt with at the said trial which shall commence on 24 May 2000 at 9am and to continue from day to day until its completion.

As for costs of this appeal which the defendants succeeded in part, I allow costs at 20% to the defendants. The order of the deputy registrar is accordingly set aside.

Order accordingly.

Reported by Jafisah Jaafar